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IN THE

Supreme Court of the United States

October Term, 1967
No. 1119

N. JOSEPH ROSS,

Petitioner,

vs.

FEDERAL HOME LOAN BANK BOARD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF INTERVENOR N. JOSEPH ROSS IN SUPPORT OF PETITION.

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SUBJECT INDEX

Page

Preliminary 1

I.

The Excluded Shareholder Members of Long Beach, Including Intervenor Ross, Have Been Dprived of Procedural Due Process 2

II.

The Bank Board Ignores the Effect of the Severability Clause in the Merger Agreement 3

III.

The Bank Board Ignores the Effect of the Administrative Procedure Act 4

IV.

The Impact of the Court of Appeals' Opinion 4

V.

The District Court Did Not Revise the Terms of Distribution 5

VI.

Re Bank Board's Contentions on the Merits 5

VII.

Importance of Case 7

Conclusion 8

TABLE OF AUTHORITIES CIED

Cases	Page
Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752	5
Federal Power Commission v. Idaho Power Co., 344 U.S. 17	5
S.E.C. v. Chenery Corp., 318 U.S. 80	5
Statute	
United States Code, Title 12, Sec. 1464(a)	6

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Preliminary.

The brief of the Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation (hereafter "Bank Board") in opposition to the Petition of Intervenor N. Joseph Ross for Certiorari (hereafter the "Ross Petition") fails to meet the thrust of the Petition.

Three of the four questions presented, and one of the two reasons relied on for granting the writ, are ignored completely or glossed over in a cavalier fashion. Instead the Bank Board hurls a variety of adjectives at the shareholder depositors which are not only irrelevant

here but assume matters which were never tried in the courts below or in any administrative proceeding. The present reply is designed to put the matter in proper focus.

I.

The Excluded Shareholder Members of Long Beach, Including Intervenor Ross, Have Been Deprived of Procedural Due Process.

One of the fundamental questions raised in the Ross Petition was whether members of a federally chartered savings and loan association can be deprived of their pro rata share of stock received upon a merger without advance notice, an administrative hearing, or judicial review (See Ross Petition, p. 15, question II and pp. 24-28).

The Bank Board's response does not even address itself to this question.

As noted in the Ross Petition (pp. 24-25):

1. The Long Beach shareholders were not notified at the time of their deposits that in the event of a merger they would not receive their pro rata share.

2. The Bank Board did not hold any hearing at which findings were made to justify exclusion of certain of the shareholder members of Long Beach.

3. No plenary trial has been held in the District Court to test the Board's action, while the Court of Appeals itself assumes for purposes of its decision that the exclusionary clauses were invalid.

In short, a large group of shareholder depositors have been deprived of valuable property interests without

any opportunity for either an administrative or court hearing.

Nor is it any answer to this lack of due process to suggest that the excluded shareholders were "speculators" or receiving a "windfall". Certainly the right to due process does not depend upon any preconceived notion of the governmental agency involved as to the supposed "guilt" of an alleged offender.

II.

The Bank Board Ignores the Effect of the Severability Clause in the Merger Agreement.

Like "Hamlet without the Prince", the Bank Board's brief conveniently buries in a footnote one of the central facts in the present case, namely that by the express terms of the Merger Agreement, the excluded shareholder members were led to believe that their right to challenge the exclusionary clauses would be preserved. Thus, the Merger Agreement recites:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach or *any part thereof*, incorporated herein." (Emphasis added) [Pltf. Ex. 12/9/63-10A, p. 47].

In the face of this express severability clause, the Bank Board's reliance on shareholders' approval of the merger is misplaced. As the Court of Appeals itself notes (C.A. Opinion, p. 7):

> "Each favorable ballot, cast under authority of a proxy or otherwise, expressly stated that it was cast in reliance upon" the foregoing language in the Merger Agreement (See Ross Petition, p. 11, footnote 12).

III.

The Bank Board Ignores the Effect of the Administrative Procedure Act.

As pointed out in the Ross Petition (pp. 20-21), the Administrative Procedure Act is applicable to the Bank Board and clearly contemplates *effective judicial review* of the Board's action. Yet the Court of Appeals' opinion precludes any effective review of the Board's action.

IV.

The Impact of the Court of Appeals' Opinion.

The Court of Appeals' opinion goes beyond the holdings described in the Bank Board's brief. The Court of Appeals not only holds that the federal courts are without power to review or nullify an invalid provision of a merger agreement without setting aside the entire merger, but likewise holds that *the Bank Board itself is powerless to remedy the situation once the merger has been approved and consummated.* (C.A. Opinion, p. 20).

The Bank Board also ignores the practical effect of the Court of Appeals' decision. By foreclosing a post-merger challenge to the distribution provisions, the decision below places the courts in a position where they must either:

1. Increase the vulnerability of mergers to shareholder attack—a course which may invite a rash of "strike suits"; or

2. Routinely reject such attacks, thereby depriving the injured shareholder of the only recourse ostensibly open to him.

Thus the excluded shareholders and the District Court are placed in a procedural straight jacket whereby they must choose between two highly undesirable alternatives without being able to adopt a feasible middle course.

The Bank Board's brief also ignores the effect of the Court of Appeals' over-extension and misapplication of the decisions of this Court in *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767 (1947); and *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Of particular importance here is the failure of the Court of Appeals to give due recognition to the effect of the severability clause under the *Idaho Power* case. (See Ross Petition, p. 23).

V.

The District Court Did Not Revise the Terms of Distribution.

The District Court did not revise the distribution clause of the Merger Agreement but was merely enforcing the terms of the Long Beach Charter and the mandate of Congress, both of which were deemed to require pro rata distribution of the Equitable Stock among the Long Beach depositors.

VI.

Re Bank Board's Contentions on the Merits.

1. The Bank Board's claims as to the "fairness" of its action and its characterization of excluded shareholders as "speculators", recipients of a "windfall", etc., *assume facts which have never been heard or tried in any administrative or court hearing, let alone deter-*

mined in the Bank Board's favor. Nor did the Court of Appeals rest its decision on this ground.

Certainly the excluded shareholders, including Intervenor Ross, are entitled to a hearing on these questions; the Bank Board's assumptions "that generally new accounts would not be opened by bona fide savers in amounts larger than $10,000 in any one account" (Bank Board's Brief, p. 6, footnote 5) and that a depositor who was forced to pledge his account to a lender was somehow guilty of wrongdoing, should at least be subject to challenge.[1]

2. The Bank Board's brief ignores some of the principal grounds relied on by the District Court:

(a) The effect of 12 U.S.C. §1464(a), which requires *all* federal savings and loan associations to be *mutual* (Ross Petition, p. 8).[2]

(b) The Bank Board cannot forfeit the interests of the shareholder members by *an edict issued after their deposits were made and without prior notice* (Ross Petition, p. 9).

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[1]While noting that the majority of savings and loan *accounts* have balances under $10,000.00, the Bank Board conveniently ignores the fact that savings and loan associations throughout the United States average over 31.4 percent of their *savings deposits* in accounts of more than $10,000.00 each (See Elliott Petition (No. 1118), p. 15, note 17).

[2]The Bank Board's brief itself acknowledges (p. 13, footnote 14) that "when a mutual association is merged into a permanent stock association, as in the instant case, *there must be a distribution of the net worth of the mutual association to its shareholders* . . ." (Emphasis added.) Yet in the present case, the Bank Board excluded a substantial segment of the shareholders of Long Beach Federal—a *mutual* association—from participation in the net worth of the association.

VII.

Importance of Case.

Contrary to the Bank Board's assertion, the present case has importance transcending even the fate of the thousands of Long Beach shareholder depositors directly affected by the Court of Appeals' opinion.

The erroneous principles announced by the Court of Appeals, and its misapplication of decisions of this Court, *can readily be applied to other areas of administrative action,* with equally drastic and unjust results.

Insofar as the Bank Board contends that there has been no litigation in this area in the past, that stems from the fact that neither the Bank Board *nor the appellate courts have heretofore adopted such a course of conduct as is evidenced in the instant case.* If the Court of Appeals' opinion is permitted to stand, it will serve as *an invitation to similar administrative abuses* and may well lead to a rash of future litigation.

Nor is it any answer for the Bank Board to suggest that it is presently conducting studies which may result in *future legislation or regulations in this area.* Even if such regulations or legislation—the specifics of which are not even suggested in the Bank Board's brief —are adopted, *they will not serve to remedy the obvious lack of due process in the present case.* Intervenor Ross and the other shareholder depositors of Long Beach Federal were entitled to be dealt with under *existing law* and *not on the basis of the Bank Board's hind-*

sight or of regulations or legislation which *did not exist when they made their deposits* and does not exist even at this late date.

Conclusion.

The Bank Board has not, and presumably cannot, answer the basic questions raised in the Ross Petition. We submit that those questions are of sufficient importance to warrant consideration by this Court, and again respectfully urge that the Petition be granted.

Respectfully submitted,

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